(3) (3)

Supreme Court, U.S.
FILED
NOV 22 1999

Nos. 99-466 and 99-500

In the Supreme Court of the United States

CITY OF LOS ANGELES, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

AIRPORTS COUNCIL INTERNATIONAL–NORTH AMERICA, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

MARK B. STERN
ANDREA J. WORDEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

NANCY E. MCFADDEN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

THOMAS L. RAY
Senior Attorney

Department of Transportation
Washington, D.C. 20590

15??

QUESTION PRESENTED

Whether the Department of Transportation permissibly determined under 49 U.S.C. 47129(a)(1) (1994 & Supp. III 1997) that it was unreasonable for the City of Los Angeles to calculate airport landing fees at Los Angeles International Airport based on the fair market rental value of the airfield land.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997)	12
Chevron, U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8
Citizens Bank of Md. v. *Strumpf*, 516 U.S. 16 (1995)	12
City of Los Angeles v. *DOT*, 103 F.3d 1027 (D.C. Cir. 1997)	4
City of New York v. *FCC*, 486 U.S. 57 (1988)	8-9
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 (1981)	12
Doe v. *Oak Park & River Forest High Sch. Dist.*, 115 115 F.3d 1273 (7th Cir.), cert. denied, 118 S. Ct. 564 (1997)	8
New York v. *United States*, 505 U.S. 144 (1992)	11
Northwest Airlines, Inc. v. *County of Kent*, 510 U.S. 355 (1994)	8, 11
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981)	7
Printz v. *United States*, 521 U.S. 898 (1997)	11
Virginia Dep't of Educ. v. *Riley*, 106 F.3d 559 (4th Cir. 1997)	8
Wisniewski v. *United States*, 353 U.S. 901 (1957)	7
Youakim v. *Miller*, 425 U.S. 231 (1976)	11

Statutes: Page

Individuals with Disabilities Education Act, 20 U.S.C. 1412(1) 9
Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 2
§ 113(a)(2), 108 Stat. 1577:
49 U.S.C. 47129 (1994 & Supp. III 1997) 6, 9
49 U.S.C. 47129(a)(1) (1994 & Supp. III 1997) 2, 8
49 U.S.C. 47129(a)(2) 3, 10
49 U.S.C. 47129(a)(3) 2
49 U.S.C. 40116(e)(2) 2
49 U.S.C. 47107(a)(1) 2, 5
49 U.S.C. 47107(a)(16) 5

In the Supreme Court of the United States

No. 99-466

CITY OF LOS ANGELES, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

No. 99-500

AIRPORTS COUNCIL INTERNATIONAL–NORTH AMERICA, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported 165 F.3d 972. The per curiam order of the court of appeals denying rehearing (Pet. App. 109a-117a) is reported at 179 F.3d 937. The decision of the

Department of Transportation (Pet. App. 18a-78a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1999. The petitions for rehearing were denied on June 18, 1999 (Pet. App. 118a). The petitions for a writ of certiorari were filed on September 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Anti-Head Tax Act permits state and local governments to collect "reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision." 49 U.S.C. 40116(e)(2). A second statute, 49 U.S.C. 47107, requires airports that accept federal grants to comply with certain conditions, including that "the airport will be available for public use on reasonable conditions and without unjust discrimination." 49 U.S.C. 47107(a)(1). The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569, requires the Secretary of Transportation to "issue a determination as to whether a fee imposed upon one or more air carriers * * * by the owner or operator of an airport is reasonable," if either an air carrier or the owner or operator of an airport requests such a determination. 49 U.S.C. 47129(a)(1) (1994 & Supp. III 1997). Under the FAAAA, the Secretary "may only determine whether the fee is reasonable or unreasonable and shall not set the level of the fee." 49 U.S.C. 47129(a)(3).

---

[1] References to Pet. App. refer to the appendix included in the petition filed by the City of Los Angeles et al., No. 99-466.

The FAAAA also provides that "[a] fee subject to a determination of reasonableness * * * may be calculated pursuant to either a compensatory or residual fee methodology or any combination thereof." 49 U.S.C. 47129(a)(2). Under a residual methodology, the airport's profits from non-airfield sources—such as parking contracts and concession franchising—are used to reduce the airlines' landing fees. By contrast, a compensatory methodology calculates landing fees at a level sufficient to recover the entirety of the airport's aeronautical cost, without regard to revenues generated from non-aeronautical sources. Pet. App. 2a-3a, 14a n.3, 24a-25a.

2. Petitioners City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners (collectively the City) own and operate Los Angeles International Airport (LAX). Petitioner Airports Council International–North America (ACI-NA) is an airport trade association.

Before 1993, the City, pursuant to contracts with the airlines using LAX, calculated landing fees based on a residual methodology that applied any expected non-aeronautical surplus to the anticipated costs of aeronautical operations. Pet. App. 2a-3a. In 1993, the City proposed to calculate landing fees using a compensatory methodology that would charge the airlines for the entirety of its aeronautical costs. Also for the first time, the City included in its estimated aeronautical cost the current annual fair market rental value of the airfield land, on the theory that such valuation was necessary to compensate the City for the ongoing "opportunity cost" of using the airfield land for airport purposes. Appraising the airfield land at fair market value, together with other costs, led the City to propose

trebling the airlines' landing fees. When contract negotiations with the airlines for a compensatory fee agreement failed, the City unilaterally imposed the increased fees. *Id.* at 3a-4a.

The airlines filed a complaint with the Secretary under the FAAAA, challenging the new fees, including the fair market rental value charge. The Secretary concluded that the City's fair market value charge was unreasonable, because the Anti-Head Tax Act required that the City value the airfield land according to its historic cost. Pet. App. 4a-5a. The court of appeals reversed, holding that the Secretary erroneously concluded that the Anti-Head Tax Act mandated the use of historic cost valuation to the exclusion of every other method of valuing the land under the airfield. *Id.* at 5a (citing *City of Los Angeles* v. *DOT* (*LAX I*), 103 F.3d 1027, 1032 (D.C. Cir 1997)). The court of appeals in *LAX I* accordingly directed the Secretary on remand to consider the "respective merits of the historic cost and fair market value methodologies here at issue." 103 F.3d at 1032; see also Pet. App. at 87a-94a.

3. On remand, the Secretary concluded that the City unreasonably calculated landing fees at LAX based on the fair market rental value of the airfield land. Pet. App. 18a-78a. The Secretary rejected the City's principal contention that the fair market value calculation was needed to defray the City's opportunity costs of using the airfield land for airport purposes. The Secretary reasoned that the City "incurs no opportunity cost when the airfield land is used for the airfield," because the City is legally obligated to continue using LAX as an airport. *Id.* at 38a. The Secretary explained that the City accepted federal grants for the eleven years preceding 1993 under agreements in which the City assured the FAA that it would continue operating LAX

as an airport for the foreseeable future. *Id.* at 40a-41a. The Secretary also reasoned that the City was bound by federal law to make LAX available for public use as an airport and not to alter LAX's layout plan without the Secretary's prior approval. *Id.* at 40a (citing 49 U.S.C. 47107(a)(1) and (16)).

The Secretary also rejected the City's contention that a fair market value charge was necessary "to give the City 'the proper incentive' to continue operating the airport." Pet. App. 45a. The Secretary concluded that "the City has not shown that it needs any such incentive," because "[t]he airport provides major benefits for the Los Angeles area's economy, generates large earnings, and cannot practicably be replaced or moved." *Ibid.* The Secretary explained that

> [t]he City's calculation of its alleged opportunity costs gave no recognition to the benefits it receives from the airport. The City's position essentially assumes that the City's use of the land as an airport creates no benefits at all for the City, a statement which * * * is contrary to the record and common sense.

Pet. App. 50a.

The Secretary also relied on the fact that "no other U.S. airport calculates its landing fees on the basis of the fair market value of its airfield land." Pet. App. 56a-57a. The Secretary reasoned that the universal practice by airports of valuing airfield land at historic cost in setting compensatory fees "suggests that the [fair market value] charge is neither essential for airport operations nor generally viewed by other airports as desirable." *Id.* at 57a.

4. The court of appeals affirmed. Pet. App. 1a-17a. The court of appeals held that the Secretary reasonably

rejected the City's fair market value charge on the ground that the City had a fixed legal obligation to use LAX as an airport. *Id.* at 10a-12a. The court of appeals also upheld as reasonable the Secretary's alternative conclusion that the benefits that LAX confers on the City offset any opportunity costs resulting from operating LAX as an airport. Pet. App. 13a-15a.[2]

The court of appeals denied rehearing en banc. Pet. App. 109a-110a. Judge Silberman filed a statement concurring in the denial of rehearing en banc. *Id.* at 110a-113a. Judge Williams and Judge Ginsburg dissented. *Id.* at 113a-117a. In their view, the agency had not set forth an adequate basis for rejecting the City's contention that it reasonably set landing fees based on its opportunity costs. *Ibid.*

ARGUMENT

1. Petitioner ACI-NA contends (Pet. 13-14) that this Court should grant certiorari to resolve an alleged inconsistency between the court of appeals' decision and its prior decision in *LAX I*. The decision below, however, does not conflict with *LAX I*. In *LAX I*, the court of appeals held that the Secretary had misconstrued the Anti-Head Tax Act and 49 U.S.C. 47129 (1994 & Supp. III 1997) to mandate that landing fees be assessed based on the historic cost of the airfield. Pet. App. 88a-90a. The court of appeals thus directed the Secretary on remand to "give express consideration to the City's arguments in support of market valuation, which he did not address before presumably because he thought he was bound by the statute to use the historic

---

[2] The court of appeals also rejected the City's contention that the Secretary's decision constituted an unconstitutional taking. Pet. App. 15a-17a. Petitioners do not ask this Court to review that ruling.

cost approach." *Id.* at 93a. Nothing in that decision barred the Secretary on remand from considering the City's claim of opportunity costs, and then determining that the City's opportunity costs were nonexistent because the City was bound by its grant obligations to operate LAX as an airport. Because the court of appeals in *LAX I* "did not analyze any argument based upon the federal airport grant provision," *Id.* at 12a-13a, *LAX I* is entirely consistent with the court of appeals' conclusion that the Secretary reasonably considered and rejected the City's opportunity cost theory.[3]

2. Petitioners contend (City Pet. 18-24; ACI-NA Pet. 14-17) that the court of appeals erred in deferring to the Secretary's determination because the federal airport grants to the City did not unambiguously state that the City could not use fair market valuation in setting landing fees at LAX. Petitioners argue that the decision below was therefore at odds with *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), in which this Court stated that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."

Nothing in the decision in *Pennhurst* suggests, however, that when it is clear that Congress intends to impose obligations on local governments receiving federal funds, the scope of those obligations should be determined by anything other than normal rules of statutory construction, including principles of deference

---

[3] In any event, any inconsistency between the two decisions of the D.C. Circuit would not warrant resolution by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Here, Congress has expressly provided that the Secretary "shall issue a determination as to whether a fee imposed upon one or more air carriers * * * by the owner or operator of an airport is reasonable." 49 U.S.C. 47129(a)(1) (1994 & Supp III 1997). The Secretary's reasonable determination under that delegated power is therefore entitled to deference.

Indeed, even before Congress passed the FAAAA to direct the Secretary to resolve airport fees disputes, this Court recognized that the Secretary is "equipped, as courts are not, to survey the field nationwide, and to regulate" airport fees imposed under the Anti-Head Tax Act. *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 367 (1994). The Court likewise concluded that the Secretary's reasoned decision on the appropriateness of a fee methodology would be entitled to "substantial deference." *Ibid.* (citing *Chevron U.S.A.* 467 U.S. at 842-845); see also *Kent*, 510 U.S. at 368 n.14 (noting that the Secretary could use his "capacity to comprehend the details of airport operations across the country and the economics of the air transportation industry" in order to determine whether fees are reasonable under Anti-Head Tax Act, and that Secretary's "exposition will merit judicial approbation" if it is based on permissible reading of the statute). The court of appeals thus properly deferred to the Secretary's reasoned determination under the FAAAA.[4] Cf. *City*

---

[4] For those reasons, petitioners err in contending (City Pet. 17-21; ACI-NA Pet. 15) that the court of appeals' decision conflicts with *Virginia Department of Education* v. *Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), and *Doe* v. *Oak Park & River Forest High School District*, 115 F.3d 1273 (7th Cir.), cert. denied, 118 S. Ct. 564 (1997). Those decisions, which petitioners did not cite before the

of New York v. *FCC*, 486 U.S. 57, 64 (1988) (statutorily authorized regulations of federal agency pre-empt conflicting state or local law).

Moreover, the Secretary's conclusion that the City has no recoverable opportunity costs in operating the airfield land for airport purposes did not add any new condition to the federal grant. Federal law and the grant agreements with the City clearly require the City to use LAX for airport purposes and to impose only reasonable fees. Pet. App. 12a, 39a-42a.[5] Because those obligations bar the City from converting the airport to other uses, the Secretary determined that the City unreasonably employed a fair market value methodology to compensate it for the opportunity cost of putting the airport to other uses. As the court of appeals explained, the Secretary's ruling simply "focused on a *consequence* of an unambiguously imposed condition—that the airport would be kept open for public use—that was present from the outset." *Id.* at 13a. The Secretary therefore properly relied on the City's grant assurances in determining that the City's proposed opportunity cost pricing was unreasonable.[6]

---

court of appeals, address the obligations of state and local governments under the Individuals with Disabilities Education Act, 20 U.S.C. 1412(1), to "assure[] all children with disabilities the right to a free appropriate public education."

[5] The City implies (Pet. 22 n.18) that the grant conditions do not expressly require it to operate LAX as an airport. The City did not challenge, however, the Secretary's conclusion that the City must use the airfield for airport purposes, Pet. App. 39a-42a, and petitioners do not suggest that the City presently may convert the airport to any other use.

[6] Indeed, it is difficult to imagine how, under the petitioners' theory, the Secretary could fulfill his statutory mandate under 49 U.S.C. 47129 (1994 & Supp. III 1997) to determine whether airport

3. Petitioners also argue (City Pet. 25-29; ACI-NA Pet. 16-20) that the Secretary's alternative rationale—that any opportunity costs incurred by the City are offset by the benefits the City receives from LAX—conflicts with 49 U.S.C. 47129(a)(2), which permits airlines to adopt a compensatory fee methodology, and is inconsistent with the Court's acceptance of a compensatory methodology in *Kent*. Neither of those contentions has merit.

As an initial matter, the Secretary's decision does not bar the City from charging compensatory fees that reimburse the City for the entirety of its aeronautical operations cost, without regard to any surplus or deficit in revenues from non-aeronautical operations. Rather, the Secretary concluded that it was unreasonable for the City to calculate its aeronautical costs by using the fair market value of the airfield land when the City incurs no opportunity costs from using the airfield land for airport purposes. As the Secretary stated, his "analysis in no way precludes the airport from charging landing fees covering its other costs. Indeed, [the Secretary] ha[s] upheld over the airline complainants' objections most of the other charges included in calculating the LAX landing fees." Pet. App. 52a.

The Secretary's reasoning is also fully consistent with this Court's decision in *Kent*. In that case, the Court held that the reasonable fee requirement of the Anti-Head Tax Act does not compel an airport to use its earnings from non-aeronautical sources to lower its aeronautical fees, and that an airport may reasonably

---

fees are reasonable. The statutory scheme would become a virtual nullity if the basis for a determination by the Secretary that a fee is unreasonable could be challenged as an impermissible "new condition" on the local government.

charge airlines for the full cost of providing the particular facilities and services they use. 510 U.S. at 369-372. The Court did not address whether an airport operator may calculate its aeronautical costs by the fair market rental value of airfield land based on opportunity costs. Indeed, LAX is the only airport in the country that has attempted to base its landing fees on its airfield's fair market value. Pet. App. 56a-57a.

Moreover, the Secretary's decision "in no sense adopted a general requirement that airports must credit their non-airfield surpluses toward their airfield costs." Pet. App. 14a; see also *id.* at 51a ("we are not using the City's benefits to offset the City's other airfield costs"). Rather, the City's contentions that it incurred opportunity costs invited the Secretary to consider whether the benefits to the City from the airport were insufficient to give the City an incentive to continue to operate LAX. *Id.* at 14a; see also *id.* at 50a-51a ("The City's expert * * * stated that a person's use of a property incurs no opportunity costs if that use generates more revenue than the person could obtain from any other use of the property."). The court of appeals therefore correctly concluded that it was reasonable for the Secretary, "when faced with a demand for an economic analysis, to consider factors that an economist might take into account." *Id.* at 14a-15a; see also *Kent*, 510 U.S. at 367, 368 n.14.

4. Petitioner ACI-NA also asserts (Pet. 21-23) that the Secretary's determination requires the City to subsidize airlines in violation of the Tenth Amendment principles articulated in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). That argument was not made below and, accordingly, is not properly before this Court. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per cu-

riam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); accord *Auer* v. *Robbins*, 519 U.S. 452, 463-464 (1997); *Citizens Bank of Md.* v. *Strumpf*, 516 U.S. 16, 20 n.* (1995); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

In any event, petitioner's contention erroneously assumes that the City must subsidize airlines because the City cannot recover the opportunity costs of continuing to operate LAX as an airport. As discussed above, however, the City is prohibited from converting LAX to non-airport uses and therefore incurs no such opportunity costs. The Secretary therefore properly determined that it was unreasonable for the City to take the unprecedented step of charging airlines the fair market rental value of airfield land based on a "non-existent opportunity" to use the land for non-airport purposes. Pet. App. 111a (Silberman, J., concurring in the denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NANCY E. MCFADDEN
General Counsel

DAVID W. OGDEN
Acting Assistant Attorney General

PAUL M. GEIER
Assistant General Counsel for Litigation

MARK B. STERN
ANDREA J. WORDEN
Attorneys

THOMAS L. RAY
Senior Attorney
Department of Transportation

NOVEMBER 1999